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No. 72-1162

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

FEDERAL POWER COMMISSION,
Petitioner,

v.

NEW ENGLAND POWER COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR NEW ENGLAND POWER COMPANY IN OPPOSITION

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Question Presented

(A restatement of the issue presented by Petitioner.)

Whether Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. § 483a), authorizes an annual assessment upon electric utilities by the Federal Power Commission to recover the cost of its activities under Parts II and III of the Federal Power Act (16 U.S.C. § 824(a), *et seq.*).

Statement

This case arises from Federal Power Commission ("FPC") Order No. 427 of March 18, 1971, 45 FPC 440, which established in regard to electric utilities, such as respondent New England Power Company ("NEPCO"): (a) filing fees to cover the cost of processing applications seeking FPC approvals under Parts II and III of the Federal Power Act;[1] and (b) annual assessments to recoup the cost of other FPC activities under Parts II and III.[2] It is the latter charges only which were challenged and set aside by the court below.

While Parts II and III authorize a wide range of activities by the FPC, regulatory jurisdiction over electric utilities under Parts II and III is strictly limited. They do not provide the FPC any jurisdiction over facilities used for the generation, intrastate transmission or local distribution of electric energy, nor do they include licensing or certification of facilities necessary to conduct even interstate business. *Duke Power Company* v. *FPC*, 401 F.2d 930 (D.C. Cir. 1968).

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[1] Public utilities must make filings or file applications in connection with the export of electric energy to a foreign country (section 202(e)); certain dispositions and consolidations of property in interstate commerce and purchases of securities (section 203); security issuances of certain public utilities and assumptions of liability (section 204); wholesale for resale rate schedules and contracts governing inter-utility relationships in interstate commerce (section 205); and the holding of certain interlocking directorates (section 305).

[2] Such activities include national and region power surveys, interconnection analyses and reliability studies (section 202(a)); complaints concerning interconnections (section 202(b)); investigations concerning rates and adequacy of service (sections 206 and 207); the establishment and updating of systems of account and auditing of accounts (section 301); depreciation studies and audits (section 302); establishing and requiring periodic and special reports (section 304); and investigations relating to electric energy (section 311).

Parts II and III, enacted in 1935, were designed to fill the gap in State regulatory authority when electric utilities operate in interstate commerce. *Jersey Central Power and Light Company* v. *FPC*, 319 U.S. 61 (1943). Congress left to the States their pervasive authority over the facilities, standards of service, retail rates and activities of electric utilities in general within each State. The regulatory provisions of Parts II and III, by the terms of the statute, " . . . extend only to those matters which are not subject to regulation by the States." Section 201(a).

Electric utilities such as NEPCO, which is a subsidiary of the New England Electric System, are also subject to Securities and Exchange Commission jurisdiction under the Public Utility Holding Company Act of 1935. 15 U.S.C. § 79, *et seq.*

Part I of the Federal Power Act,[3] 16 U.S.C. § 791, *et seq.*, which requires an FPC license for the use by non-federal entities of waters of the United States for the development of power, has a specific provision for assessments upon licensees to recover its cost of administration (section 10(e)). Parts II and III have no provision for recovering the cost of FPC activities under them. As authority for the annual assessments, the FPC cited Title V of the Independent Offices Appropriations Act, 1952, 31 U.S.C. § 483a.

In 1965 the FPC, in considering Title V, stated that fees

> "with respect to the exercise of our regulatory activities under Parts II and III of the Federal Power Act . . . would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies." 30 Fed. Reg. 12077.

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[3] Originally, the Federal Water Power Act of 1920, 41 Stat. 1063.

In its 1971 order adopting the annual assessments, however, the FPC argued that its administration of Parts II and III had redounded to the benefit of the electric utility industry

> "by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability . . ." (Pet. App. p. 3a),

and that the FPC had therefore provided a "benefit" to electric utilities within the meaning of Title V for which it was authorized to charge the industry.

Respondent NEPCO sought review of the 1971 Order. The court below set aside that part of the FPC Order which established annual assessments to recoup the cost of FPC activities other than the processing of applications.[4] The court held that these activities primarily benefit the general public as ultimate customers, and that, therefore, Title V did not authorize annual assessments upon electric utility companies to pay for them.

Reasons for Denying the Writ

1. There is absolutely no conflict between the decision of the court below and the holding of the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States,* 464 F.2d 1313.[5] The court below struck down annual assessments upon electric utilities to pay for FPC activities not directly related to the processing of applications required by its

[4] NEPCO challenged (1) the lawfulness of the annual assessments and (2) the fairness of the particular formulae by which they were to be applied. The court below found it was unnecessary to reach NEPCO's second point in view of its disposition of the first point.

[5] Petition for a writ of certiorari pending *sub nom. National Cable Television Association* v. *United States, et al.,* No. 72-948.

limited jurisdiction over electric utilities, while the latter upheld annual fees assessed to recover the Federal Communication Commission's ("FCC") cost of licensing and regulating broadcast licensees and CATV systems which require FCC authorization to operate. In the former case, the FPC activities for which cost recovery is sought do not affect the authority of electric companies to do business, and these companies are not the recipients of special benefits; as the court below held, the primary beneficiary is the general public. In the latter case, the FCC activities directly relate to the authority of those being assessed to do business, and they, therefore, are identifiable as recipients of special benefits.

The court below held that Title V was enacted to recoup costs "from identifiable 'special beneficiaries' where the services rendered inured to the benefit of special recipients not the general public" (Pet. App. p. 7a), and that electric utilities were not such special beneficiaries of the activities for which the FPC sought cost recovery. The court further concluded that the creation of an "economic climate", the special benefit claimed by the FPC, was not the kind of service contemplated by either Title V or by Budget Circular A-25 (Pet. App. pp. 61a-62a; Pet. App. p. 9a).

In *Clay Broadcasting, supra,* the Fifth Circuit upheld the adoption by the FCC pursuant to Title V of set, annual fees to be paid by broadcast licensees and CATV systems each year during the period they are authorized by the FCC to operate. Broadcast licensees and CATV systems carry on their business operations because of actions taken by the FCC under the Federal Communications Act of 1954, 47 U.S.C. § 151, *et seq.* Broadcasters must apply to the FCC for a license to operate on a portion of the public's electromagnetic spectrum. CATV operators not only use the broadcast signals licensed by the FCC but must operate

their systems in accordance with FCC regulations. 47 C.F.R. § 76.11(a).

Prior to the enactment of Title V, broadcast licensees were specifically mentioned as beneficiaries of governmental services to which Title V would apply. See remarks of its principal proponent in the House, Representative Yates. 97 Cong. Rec. 4809 (1951). The only issue in regard to annual license fees assessed against broadcast licensees would appear to be the reasonableness of the fees, and on this matter the agency involved has wide discretion. *Aeronautical Radio, Inc.* v. *United States,* 335 F.2d 304 (7th Cir. 1964), *cert. denied,* 379 U.S. 966 (1965).

Electric utilities operate independently of the Federal Power Commission. They are authorized to engage in business pursuant to state laws and local franchises. No permission to enter the field is needed from the Federal Power Commission. As heretofore noted, it is only with respect to certain interstate activities that compliance with FPC regulations is required. In this respect electric utilities are similar to locally franchised telephone companies over whose interstate rates the FCC has regulatory jurisdiction comparable to that of the FPC over electric utilities. Compare 47 U.S.C. §§ 201-222 and 16 U.S.C. §§ 824-825. The FCC, however, has not adopted any schedule of annual charges to be paid by telephone utilities for the cost of administering the Communications Act.

There is no conflict between Circuits on the application of Title V.[6] No licenses to do business are issued under

[6] Even the Solicitor in his brief opposing certiorari in *Clay Broadcasting* acknowledged the existence of a "most fundamental factual distinction between the two cases." Electric utilities make no use comparable to that of broadcast and CATV systems of public property, viz., the public electromagnetic spectrum. Brief for the United States in Opposition, No. 72-948, fn. 4, p. 11.

Parts II and III. In addition to processing applications, for which it has prescribed fees, a substantial portion of the FPC's Part II and III work is devoted to matters of broad consumer and investor, as well as utility, interest. Its activities include energy, accounting and depreciation studies and investigations, national power survey studies, rulemakings, legislative proposals and electrical reliability and coordination studies. Plainly, these agency activities find support as a benefit to the general public and not to identifiable persons, as the Commission itself recognized in its prior rulemaking and as the court below expressly concluded (Pet. App. pp. 9a-10a). These activities are plainly not the kind of *services* to *persons* for which Title V authorizes charges and fees, and *Clay Broadcasting* does not hold to the contrary.

2. The holding of the court below in regard to annual assessments upon electric utilities is sound and represents the only viable interpretation of Title V. Title V plainly expresses a legislative intent to charge fees only for identifiable services to identifiable recipients and not an intent to charge for administering a statute. In view of the language of Title V, *"any work, service . . . benefit . . . or similar thing of value . . . to or for any person"* (Pet. App. p. 2), something more identifiable than the mere administration of a statute is required to be provided before a charge can be made.

Implicit in Title V is a requirement that an agency distinguish between its services to individual recipients and those to the public in general before adopting a fee schedule.[7] The Atomic Energy Commission, for example, in pro-

[7] A requirement made explicit by the Bureau of the Budget's Circular A-25 (Pet. App. p. 61a).

posing revisions to its fee schedules earlier this year did make such a distinction, as it also had done in connection with its current fee schedules.[8] The FPC by its assessment system attempted to avoid the requirement.

The assessment of all entities, either subject to regulation or eligible to apply to an agency for some *work, service* . . . or *benefit,* simply has no support in the terms of the statute and, if the FPC interpretation had been upheld, would have sanctioned some very unreal applications of Title V. Labor Unions and administrators of pension plans, for example would appear to be subject to an annual assessment by the Department of Labor for all the costs of administering the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401, *et seq.,* and the Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 301, *et seq.* Is there any Federal agency which would deny that its regulation has created a favorable "economic climate" for those entities subject to its jurisdiction? When the legislative intent has been to require a group to pay for the cost of administering a regulatory statute, it has been expressed, as the court below noted (Pet. App. p. 13a), in terms quite different from those contained in Title V.

3. The decision of the court below in no way affects the jurisdiction of the FPC under the Federal Power Act, and

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[8] The AEC stated in the order adopting its current fee schedule:

> The regulatory costs associated with the processing of licenses and health and safety compliance and inspection activities were used in developing the fees. *No costs related to rule making, development of standards, codes and criteria, safeguards activities, and administration of the State relations program were included.* (Emphasis added.) 37 Fed. Reg. 8074 (1972).

A similarly stated exclusion is contained in the AEC Notice of its revised fee schedule. 38 Fed. Reg. 4272-4273 (1973).

it has no effect upon the authority of the FPC to continue to charge substantial fees to those who invoke its processes. The decision below merely confirmed what an earlier FPC had expressly recognized: that its authority under Title V does not authorize charges for activities which are primarily for the benefit of the general public, and which do not provide services to identifiable recipients. Review by this court is unnecessary.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied insofar as it relates to annual assessments for FPC activities under the Federal Power Act.

Respectfully submitted,

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